

## CHAPTER III

### AUTHORIZATION AND PAYMENT FOR INVESTIGATIVE, EXPERT AND OTHER SERVICES

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CHAPTER III. AUTHORIZATION AND PAYMENT FOR INVESTIGATIVE,  
EXPERT OR OTHER SERVICES

Part A. General.

3.01 Availability.

- A. Investigative, expert or other services necessary to adequate representation, as authorized by subsection (e) of the Act, shall be available to persons who are eligible under the Act, including persons who have retained counsel but who are found by the court to be financially unable to obtain the necessary services. In this connection, a person with retained counsel is financially unable to obtain the necessary services if his resources are in excess of the amount needed to provide him and his dependents with the necessities of life, provide defendant's release on bond, and pay a reasonable fee to his retained counsel, but are insufficient to pay for the necessary services. In responding to requests for subsection (e) services by a defendant represented by retained counsel, the court should inquire into the fee arrangement between the retained attorney and the defendant. If the court finds the fee arrangement unreasonable in relation to fees customarily paid to qualified practitioners in the community for services in criminal matters of similar duration and complexity, or that it was made with a gross disregard of the defendant's trial expenses, the court may order the attorney to pay out of such fees all or such part of the costs and expenses as the court may direct. The procedure outlined in paragraph 2.05 shall apply to such persons who are financially able to pay some, but unable to pay all, the costs of necessary services.
- B. Persons who are eligible for representation under the Criminal Justice Act, but who have elected to proceed *pro se*, may, upon request, be authorized to obtain investigative, expert, and other services in accordance with subsection (e) of the Criminal Justice Act.

The court should authorize subsection (e) services for *pro se* litigants and review and approve resulting claims in the same manner as is its practice with respect to requests made by Criminal Justice Act panel attorneys. However, in matters in which appointment of counsel is discretionary pursuant to subsection (a)(2) of the Act, the court should make a threshold determination that the case is one in which the interests of justice would have justified the furnishing of representation, prior to approving the requested services for *pro se* litigants.

Although a federal defender organization may be requested to provide administrative assistance to *pro se* litigants who wish to arrange for subsection (e) services, the investigative, paralegal or other services or resources of the organization should ordinarily be employed only when the organization is appointed as counsel of record, responsible for the conduct of the litigation.

### 3.02 Limitations.

- A. With Prior Authorization. With prior authorization, compensation for investigative, expert and other services is limited to \$1,000 per organization or individual, exclusive of reimbursement for expenses reasonably occurred, per individual authorization to perform said service, except with regard to capital cases. (See paragraph 6.03 for guidelines applicable to capital cases.) A separate authorization should be obtained for each type of service for each person served, and for each defendant served, and for each case. While the contractor may be compensated separately for each defendant served, care should be taken to ensure that duplicate charges are not being made for the same services. If, pursuant to subsection (e) of the Act, such services are rendered by members of an organization such as a corporation, unincorporated association, or partnership (other than those created pursuant to subsection (g) of the Act), in their capacities as members of that organization, compensation shall be deemed to have been earned by the organization and shall be paid to it only once, per defendant served, in an amount not to exceed the statutory maximum of \$1,000, exclusive of reimbursement for expenses reasonably incurred. Payment in excess of the \$1,000 limit for services authorized prior to the performance thereof may be made when certified by the United States judge or magistrate and approved by the chief judge of the circuit (or an active circuit judge to whom excess compensation approval authority has been delegated) as being necessary to provide fair compensation for services of an unusual character or duration. If it can be anticipated that the compensation will exceed the statutory maximum, advance approval should be obtained from the court and the chief judge of the circuit (or the active circuit judge to whom excess compensation approval authority has been delegated). See sample form, Appendix C.
- B. Without Prior Authorization. Subsection (e)(2)(A) of the Act authorizes the obtaining of investigative, expert and other services, without prior authorization but subject to subsequent review, providing the cost of the services obtained does not exceed \$300 plus expenses reasonably incurred (but see paragraph 6.03 A regarding obtaining investigative, expert, and other

services in capital cases). This \$300 limit may be waived however (see subsection (e)(2)(B) of the Act), if the presiding judge or magistrate judge (if the services were rendered in a case disposed of entirely before the magistrate judge) in the interest of justice, finds that timely procurement of necessary services could not await prior authorization.

- 3.03 Ex Parte Applications. *Ex parte* applications for services other than counsel under subsection (e) shall be heard *in camera*, and shall not be revealed without the consent of the defendant. The application shall be placed under seal until the final disposition of the case in the trial court, subject to further order of the court. Maintaining the secrecy of the application prevents the possibility that an open hearing may cause a defendant to reveal his or her defense. Appointed counsel shall not be required to submit evidence of a prior attempt to enter into a stipulation with the United States Attorney as a prerequisite to obtaining services under subsection (e). The court may encourage counsel to enter into stipulations, in the interest of expedition and economy, without, however, disclosing the contents or otherwise compromising the secret nature of the *ex parte* application.
- 3.04 Claims for Services Other than Counsel. All claims for services other than counsel, under subsection (e) of the Act, should include the following: a statement as to the type of, dates of, and time expended for, the services provided; an explanation of the fee arrangement (i.e., hourly rate, per diem rate, etc.); an itemized statement of all expenses for which reimbursement is claimed; and supporting documentation, where practicable, for all expenses of lodgings and subsistence, and for any expenses in excess of \$50.
- 3.05 Forms for the Authorization and Payment for Services Other than Counsel. Forms for the authorization and payment for services other than counsel, together with instructions for the execution and distribution thereof, are included in Appendix A.

3.06 Interim Payments.

- A. Non-Death Penalty Cases. Where it is considered necessary and appropriate in a specific case, the presiding trial judge may arrange for periodic or interim payments to an individual whose services are obtained pursuant to subsection (e) of the Act. Appendix F (pages F-1 through F-6) contains instructions on the procedures for effecting interim payments to persons other than counsel, as well as a sample memorandum order on this subject which provides for two alternative payment methods. The payment options provided in the order are designed to strike a balance between the interest in relieving providers of subsection (e) services of financial hardships in extended and complex cases, and the practical application of the statutorily imposed responsibility of the chief judge of the circuit to provide a meaningful review of claims for excess compensation. Other interim payment arrangements which effectuate this balance may be devised in consultation with the Defender Services Division of the Administrative Office of the United States Courts.
- B. Death Penalty Cases. Presiding judicial officers are urged to permit interim payment in death penalty cases. Because the CJA compensation maximum of \$1,000 for investigative, expert, and other services does not apply in capital cases, different procedures and memorandum orders must be used in those cases. (See paragraph 6.03 D.) These procedures and sample memorandum orders are also set forth in Appendix F, beginning on pages F-7 and F-11.

3.07 Review of Vouchers. Absent extraordinary circumstances, judges should act upon claims for compensation for investigative, expert or other services within 30 days of submission.

## Part B. Policies Regarding Investigative, Expert and Other Services

3.10 Investigators. When necessary to an adequate representation as described above, the court may authorize, pursuant to subsection (e) of the Act, the services of an investigator.

3.11 Psychiatrists, Psychologists.

A. Type of Examinations. Chapter 313 of title 18, as amended by the Insanity Defense Reform Act of 1984 (Chapter IV of the Comprehensive Crime Control Act of 1984), provides for court-directed psychiatric or psychological examination of individuals in connection with the various proceedings to determine mental condition which are authorized under that chapter. The functions of these separate proceedings are to determine: (1) the mental competency of a defendant to stand trial (18 U.S.C. §4241); (2) insanity at the time of the offense (§4242); (3) the mental condition of an acquitted person hospitalized following a finding of not guilty only by reason of insanity (§4243); (4) the present mental condition of a convicted defendant (§4244); (5) the present mental condition of an imprisoned person who objects to transfer to a treatment facility (§4245); and (6) the present mental condition of a hospitalized person due for release (§4246).

In addition, mental condition examinations may be conducted for purposes other than those specified in chapter 313, e.g., to aid the defendant in preparing his defense.

B. Source of Payment. CJA funds are used to pay for psychiatric and related services obtained in accordance with subsection (e) of the CJA upon a determination that the services are "necessary for an adequate defense." These are "defense" services, where the defendant selects the expert and controls the disclosure of the expert's report. It is important to note that psychiatrists and related experts may be used in many circumstances in which payment is made from a source other than the CJA appropriation. In these situations the court or the government selects the expert and persons other than the defendant also have access to the expert's report. The Department of Justice (DOJ) generally pays for these "non-defense" services. The chart on pages 8 and 9 of this chapter summarizes payment responsibility for the various circumstances in which psychiatric and related services are utilized.

C. Limitation of Amount. The limitations of \$1,000 and \$300 contained in paragraph 3.02 of this chapter apply to compensation claims submitted by "defense" psychiatrists and related experts, to be paid out of the CJA appropriation. [See subparagraph (E) below, regarding "dual purpose" examinations.]

D. Procedures for Payment.

- (1) CJA Appropriation. A CJA Form 21 (Authorization and Voucher for Expert and Other Services) should be submitted to the AO for all payments for "defense" services. In a death penalty case, CJA Form 31, "Death Penalty Proceedings: *Ex Parte* Request for Authorization and Voucher for Expert and Other Services" should be used. The CJA Form 21 or Form 31 should clearly describe the purpose of the expert's service. If separate vouchers are submitted for examination and testimony, they should be cross-referenced by voucher number.
- (2) Department of Justice. Compensation claims for psychiatric and related services to be paid for by the DOJ should be referred to the U.S. Attorney or Assistant U.S. Attorney.

E. Dual Purpose Examinations. On occasion, a psychiatrist or related expert will be asked to examine an individual for both a "defense" purpose and a "non-defense" purpose. In these cases the defense has waived the confidentiality of the "defense" portion of the examination. In such dual purpose examinations, for the convenience of the expert providing the service, the entire compensation claim may be submitted on a CJA Form 21, or, in a death penalty proceeding, CJA Form 31. The AO will pay the expert the total amount approved and obtain reimbursement to the CJA appropriation from the DOJ for one-half of the cost. As a result of the AO's need to seek reimbursement from the DOJ, the CJA Form 21s and Form 31s for dual purpose examinations must be accompanied by separate court orders which indicate:

- (1) who requested the examination;
- (2) the specific purpose(s) of the examination;
- (3) to whom the examination is directed; and
- (4) to whom copies of the report are to be given.

The limitation in subparagraph (C) above, applies to 50% of the claim for a dual purpose examination in which a portion of the examination is for "defense" purposes.

There also may be "dual purpose" examinations wherein both portions of the examination are chargeable to the same payment source; e.g., evaluation of competency to stand trial under 18 U.S.C. §4241 and evaluation of sanity at the time of the offense under 18 U.S.C. §4242. In this example, since the DOJ would be responsible for both portions of the examination, the entire compensation claim should be submitted to the U.S. Attorney or Assistant U.S. Attorney.



SUMMARY CHART		
RESPONSIBILITY FOR PAYMENT OF PSYCHIATRIC AND RELATED EXPERT SERVICES		
Type of Service	CJA	DOJ
1. To determine mental competency to stand trial, under 18 U.S.C. §4241		
a. Examination Costs		Yes, regardless of which party requests, including examination on court's own motion
b. Testimony costs for examiner if called at hearing		Yes, regardless of which party calls
c. Testimony costs for examiner if called at trial	If witness appears on behalf of defense	If witness appears on behalf of government
2. To determine existence of insanity at time of offense, under §4242		
a. Examination costs		Yes
b. Testimony costs for examiner if called at trial		Yes, regardless of which party calls
3. To determine existence of insanity at time of offense, under CJA subsection (e)		
a. Examination costs	Yes	
b. Testimony costs for examiner if called at trial	Yes	
4. To determine mental condition of hospitalized person found not guilty only by reason of insanity, under §4243		
a. Examination costs		Yes
b. Testimony costs for examiner if called at hearing		Yes, regardless of which party calls
5. To determine mental condition of convicted person suffering from mental disease or defect, under §4244		

SOURCE OF PAYMENT

Type of Service	CJA	DOJ
5 a. Examination costs		Yes
b. Testimony costs for examiner if called at hearing		Yes, regardless of which party calls
6. To determine mental condition of imprisoned person, under §4245		
a. Examination costs		Yes, including costs of additional examiner selected by imprisoned person in accordance with §4247(b)
b. Testimony costs for examiner if called at hearing		Yes, regardless of which party calls, including additional examiner selected by imprisoned person in accordance with § 4247(b)
7. To determine mental condition of hospitalized person due for release, under § 4246		
a. Examination costs		Yes, including costs of additional examiner selected by hospitalized person in accordance with § 4247(b)
b. Testimony costs for examiner if called at hearing		Yes, regardless of which party calls, including additional examiner selected by hospitalized person in accordance with § 4247(b)
8. Examination of a person in custody as a material witness		Yes, under all circumstances
9. Examination and testimony costs for expert witnesses not appointed under §§ 4241, 4242, 4243, 4244, 4245, 4246	If requested by the defense	If requested by the government, or if appointed as an independent expert on court's own motion under Fed. R. Evid. 706

### 3.12 Transcripts.

#### A. Authorization and Payment.

- (1) For panel attorneys, the preferred method for payment of transcripts is for the court reporter or reporting service to claim compensation directly for transcripts authorized by the court on a CJA Form 24, "Authorization and Voucher for Payment of Transcript." However, if assigned counsel elects to pay for the court authorized transcript, the attorney may seek reimbursement as an "out-of-pocket expense," and should use the CJA Form 24 for this purpose. (See paragraph 2.27 of these Guidelines.) Regardless of which method is used, the limitations of \$1,000 and \$300 mentioned in paragraph 3.02 of this chapter and \$7,500 mentioned in paragraph 6.03 B are inapplicable with regard to the cost of transcripts. (For procedures regarding federal defender organization transcript payments, see paragraph 4.03 A of these Guidelines.)
- (2) In order to obtain necessary parts of transcripts, or, if required, the entire transcript, in a direct appeal in a case in which counsel is assigned pursuant to the Criminal Justice Act, neither the Act nor Section 753 (f) of title 28, United States Code, as amended by Public Law 91-545, requires the signing of a pauper's oath or certification by the Court that the appeal is not frivolous.

#### B. Apportionment of Costs. Routine apportionment of accelerated transcript costs among parties in CJA cases is prohibited. The following resolution was adopted by the Judicial Conference in March of 1980, and modified in September of 1986:

That the furnishing of accelerated transcript services in criminal proceedings should be discouraged; however, recognizing that there are some circumstances in which such transcript services are necessary and required by either the prosecution or the defense, or both, accelerated transcript services may be provided.

That in those cases where accelerated transcript services are provided, the party from whom the request or order emanates shall pay for the original, and if the requesting or ordering party is other than defense counsel appointed under the Criminal Justice Act, the CJA counsel shall be entitled to a copy at the copy rate.

That the present practice, in some districts, of routinely apportioning the total cost of accelerated transcript services equally among the parties should be abandoned.

C. Commercial Duplication in Multi-Defendant Cases.

- (1) In multi-defendant cases involving CJA defendants, no more than one transcript should be purchased from the court reporter on behalf of CJA defendants. One of the appointed counsel or the clerk of court should arrange for the duplication, at commercially competitive rates, of enough copies of the transcript for each of the CJA defendants for whom a transcript has been approved. The cost of such duplication will be charged to the CJA appropriation. This policy would not preclude the furnishing of duplication services by the court reporter at the commercially competitive rate.
- (2) In individual cases involving requests for accelerated transcripts, the court may grant an exception to the policy set forth in part (1) of this subparagraph based upon a finding that application of the policy will unreasonably impede the delivery of accelerated transcripts to persons proceeding under the CJA. Such finding should be reflected on the transcript voucher.

D. Standards for Transcripts of Other than Federal Court Proceedings. In negotiating agreements and contracts with regard to the provision of transcripts of other than federal court proceedings, including, for example, transcription or translation of wiretap recordings, it is recommended that the standards with respect to the size and format of a page should be the same as those used for transcripts of federal court proceedings, which are contained in the Court Reporters' Manual, Vol. VI, Guide to Judiciary Policies and Procedures, Chapter XVIII.

### 3.13 Fact Witnesses and Depositions

- A. Generally speaking, fees and expenses of fact witnesses for defendants proceeding under the CJA are paid by the Department of Justice. Fed. R. Crim. P., Rule 17(b); 28 U.S.C. § 1825. Section 1825 of Title 28, United States Code, specifically provides for the payment of witness fees by the Department of Justice in all federal criminal proceedings, and in proceedings for a writ of habeas corpus or in proceedings under section 2255 of that title upon certification of a federal public defender or assistant federal public defender, or clerk of court upon the affidavit of other counsel appointed under the Criminal Justice Act. If advance witness travel funds are required, the court should issue the subpoena order, so stating, to authorize the travel advance by the marshal. These expenses will not be paid from CJA funds.
- B. Depositions are now covered by the Federal Rules of Criminal Procedure, Rule 15, rather than 18 U.S.C. § 3503. Expenses incurred in the taking of fact witness depositions (notarial fees, interpreters, transcripts, etc.) are paid by the Department of Justice, regardless of which party requested the deposition. The costs of attendance of fact witnesses at the deposition are paid by the Department of Justice under Rule 17 (b); of expert witnesses for the defense, under the Criminal Justice Act. Expenses incident to attendance of counsel and the defendant at the deposition are paid by the Department of Justice if the Government is the requesting party; CJA if the depositions are at the instance of the defense. However, it should be noted that the presence of the defendant is not essential to defense depositions since the confrontation clause only requires the defendant's presence if the depositions are intended to be used against him.
- C. In habeas corpus and 28 U.S.C. § 2255 cases, the Court may order the state or the Government to pay the "expenses of travel and subsistence and fees of counsel" to attend the taking of a deposition at the request of the state or Government. Rules governing Sections 2254 and 2255 cases in U.S. District Courts, Rule 6.

3.14 Guardian Ad Litem.

- A. In Proceedings Involving Juveniles. A guardian ad litem appointed under 18 U.S.C. § 5034 is not eligible for compensation under the Criminal Justice Act or any other authority. Any person who is appointed as both counsel and guardian ad litem in one case under § 5034 should prorate time spent fulfilling the duties of these two offices. Only time spent as counsel on a case is compensable and should be reflected on the CJA claim.
- B. In Prisoner Transfer Proceedings. A guardian ad litem appointed in proceedings to verify consent of a minor or incompetent prisoner to transfer from the United States to a foreign country is eligible for compensation under the Criminal Justice Act pursuant to 18 U.S.C. § 4109(b). (See paragraph 2.22 B(2)(iv) regarding compensation limits and Regulations for the Appointment of Counsel Pursuant to a Prisoner Transfer Treaty, which appears at Section B of this Volume.)

3.15 Commercial Computer Assisted Legal Research Services. The court may authorize counsel to obtain computer assisted legal research services, where the research is performed by employees of a commercial legal research firm or organization rather than by appointed counsel, provided that the total amount charged for computer assisted legal research services does not exceed the total amount of attorney compensation that would reasonably be approved if the appointed counsel had performed the research manually. Requests by counsel for authority to obtain such computer assisted legal research services should include the following:

- A. a brief explanation of the need for the research services; and
- B. an estimate of the number of hours of attorney time that would be required to do the research manually.

Claims for compensation for such services should be submitted on CJA Form 21, “Authorization and Voucher for Expert and Other Services”, or, in a death penalty proceeding, CJA Form 31, “Death Penalty Proceeding: *Ex Parte* Request for Authorization and Voucher for Expert and Other Services”. (See paragraph 2.31 concerning reimbursement for the cost of direct use, by appointed counsel, of computer assisted legal research equipment.)

- 3.16 Other Services and Computer Hardware and Software. In addition to investigators, psychiatrists, psychologists, and reporters, services other than counsel may include but not necessarily be limited to, interpreters, computer systems and automation litigation support personnel and experts, neurologists, and laboratory experts in the area of ballistics, fingerprinting, handwriting, etc.

The Administrative Office is authorized to pay out of Criminal Justice Act funds expenses of eligible defendants for stenographic and notarial expenses required to perpetuate and authenticate testimony of expert witnesses for such defendants.

Criminal Justice Act attorneys are expected to use their own office resources, including secretarial help, for work on CJA cases. (See paragraph 2.28 A.) However, unusual or extraordinary expenses of these types may be considered “other services necessary for an adequate defense” and may be paid from CJA funds under subsection (e) of the Act. In determining whether the expense is unusual or extraordinary, consideration should be given to whether the circumstances from which the need arose would normally result in an additional charge to a fee paying client over and above that charged for overhead expenses. (See Decision of the Comptroller General, B-139703, dated February 28, 1974, 53 Comp. Gen. 638.)

Providing an adequate defense case may require CJA panel attorneys to utilize computer hardware or software not typically available in a law office. In such cases, following the standards in the preceding paragraph, counsel may apply to the court for authorization of CJA funds for the acquisition of such property. Before seeking court approval for any computer hardware or software with a cost exceeding \$300, or for the utilization of computer systems or automation litigation support personnel or experts with an expected combined cost exceeding \$10,000, appointed counsel must consult the Defender Services Division for guidance and inform the court in writing of the Division’s advice and recommendation regarding counsel’s proposed expenditure. (A model order “Authorizing the Acquisition of Computer [Hardware and/or Software] under the Criminal Justice Act” is included in Appendix C.) The acquisition of the computer hardware and/or software, with CJA funds, shall be made by a federal defender organization designated by the Defender Services Division, or by the Division itself and shall remain the property of the United States. While computer hardware or software is being used by counsel, information contained on the hardware or software may be confidential work product and may also be protected by attorney-client privilege. Upon the completion of the case, the computer hardware and software must be returned in good condition, after all case-related materials have been removed, to a federal defender organization designated by the Division. Unless otherwise required by the court or law, counsel should retain copies, electronic or otherwise, of the case-related materials for the client’s file.

- 3.17 Reimbursement of Expenses. In determining the reasonableness of expenses of persons furnishing investigative, expert or other services, claimants and the court should be guided by the provisions of these Guidelines regarding reimbursement of expenses of counsel (see paragraphs 2.27 and 2.28). Gross receipts or other taxes levied on fees for expert services rendered pursuant to the CJA are not reimbursable expenses.

Government travel rates at substantial reductions from ordinary commercial rates may be available from common carriers for travel authorized by the court in connection with representation under the CJA. To obtain such rates, investigators and other service providers must contact the clerk of court and obtain prior approval from the presiding judicial officer.